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RESCISSION FOR BREACH OF WARRANTY.

In a recent article on this topic[1], the statement is made, that "though the text writers have not generally recognized the fact, nearly as many courts have followed the Massachusetts rule as have followed the English law." In support of this assertion, cases from the following States are cited as following the Massachusetts rule; Alabama, California, Iowa, Louisiana, Kansas, Maine, Missouri, Nebraska, North Dakota, Ohio and Wisconsin.[2]

Undoubtedly, the text-writers aforesaid opened their eyes in astonishment as they glanced over this formidable list of authorities arrayed on the Massachusetts side. One of them, at least, makes frank confession of his surprise—a surprise that impelled him to a careful examination of each of the cited cases. He begs leave to submit the result of that effort.

THE LIMITS OF THE DISPUTE.

Before entering upon this undertaking, however, it is well to have before us an authoritative statement of "the Massachusetts rule" and of "the English law," on what the learned writer calls "a disputed question in American law." Such statements are found in Bryant *v.* Isburgh[3] and Street

[1] Rescission for Breach of Warranty, by Professor Williston. 16 H. L. R. 465.

[2] At the end of this note, the learned writer adds "See Sparling *v.* Marks (1877) 86 Ill. 125; Maden *v.* Jones (1875) 1 Russ. & Chesely (Nova Scotia) 82; cases which certainly do not follow the rule."

[3] (1859) 3 Gray. (79 Mass.) 607.

v. Blay[1] respectively—both cases of present sale of a specific chattel, a horse, inspected by the buyer, who took title and possession, the seller expressly warranting the horse to be sound. The English law was declared by the Court of King's Bench[2] as follows: "When the property in the specific chattel has passed to the vendee, and the price has been paid, he has no right upon the breach of the warranty to return the article and revest the property in the vendor, and recover the price as money paid on a consideration which has failed, but must sue upon the warranty, unless there has been a condition in the contract authorizing the return, or the vendor has received back the chattel and has thereby consented to rescind the contract, or has been guilty of fraud, which destroys the contract altogether. * * * It is clear that the purchaser cannot by his own act alone, unless in the excepted cases above mentioned, revest the property in the seller, and recover the price, when paid, on the ground of the total failure of consideration; and it seems to follow that he cannot, by the same means, protect himself from the payment of the price on the same ground. On the other hand, the cases have established, that the breach of the warranty may be given in evidence in mitigation of damages, on the principle, as it should seem, of avoiding circuity of action."

The Massachusetts rule is stated by Metcalf, J., as follows:

"He to whom property is sold with express warranty, as well as he to whom property is sold with implied warranty, may rescind the contract for breach of warranty, by a seasonable return of the property, and thus entitle himself to a full defense to a suit brought against him for the price of the property, or to an action against the seller to recover back the price, if it have been paid to him."

It is apparent from these judicial statements that the question in dispute is not, whether the purchaser can rescind for the breach of any sort of warranty; but whether he can rescind for the breach of a collateral or subsidiary

[1] (1831) 2 B. & Ad. 456 (22 E. C. L.).

[2] Consisting of Lord Tenterden (before whom the case was tried and who delivered the opinion of the Court) and JJ. Littledale, Parke and Patteson.

warranty. In England as in Massachusetts, the purchaser is entitled to rescind the contract for a breach of the seller's implied engagement, that he is the owner of goods which he offers to sell; or of the implied engagement in a contract for the sale of goods by description, that the goods shall correspond with the description and be merchantable; or of the implied engagement that goods ordered and supplied for a particular purpose shall be fit for that purpose; or of the implied engagement in a contract for sale by sample that the bulk shall correspond with the sample in quality; or of other similar engagements in contracts for sale. In both jurisdictions the purchaser is allowed to waive rescission in such cases, and to treat the seller's breach as giving rise to a claim for damages against him.

The engagements above enumerated were formerly styled "implied warranties" in England, and are still so styled in Massachusetts. They are designated as implied conditions, however, in the English Sale of Goods Act,[1] while warranty is defined as "an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated."

This definition brings out with perfect clearness the limits of the dispute between the English and the Massachusetts Courts. Does a breach of warranty, using the term in the narrow sense of a promise collateral or subsidiary to the main purpose of the sale contract, give to the buyer the right to revest title and possession in the seller without the latter's consent? The Massachusetts rule answers the question in the affirmative.[2] The English law answers it in the negative.

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[1] Chap. 71. 56 & 57 Vict. 1894. See §§ 11–15, 53, 62.

[2] The first formal enunciation of this rule is in a dictum of Chief Justice Shaw in Dorr *v.* Fisher (1848) 1 Cush. (55 Mass.) 271, 274, "A warranty is a separate, independent, collateral stipulation, on the part of the vendor, with the vendee, for which the sale is the consideration, for the existence or truth of some fact, relating to the thing sold. It is not strictly a condition, for it neither suspends nor defeats the completion of the sale, the vesting of the thing sold in the vendee, nor the right to the purchase money in the vendor. * * * But to avoid circuity of action, a warranty may be treated as a condition subsequent, at the election of the vendee who may, upon a breach thereof, rescind the contract and recover back the amount of his purchase money, as in case of fraud."

Examination of Cases Cited as Following Massachusetts.

Bearing in mind the exact nature and limits of this "disputed question," let us run over the cases listed as following the Massachusetts rule.

Those cited from Iowa and Maine, together with others therein referred to, undoubtedly commit those States to the Massachusetts doctrine; although in many of the cases, the "warranty" of the vendor was not a collateral or subsidiary promise, but a vital or fundamental term of the sale contract. It would be called a condition in England, and its breach would entitle the buyer there, to treat the contract as repudiated and to reject the goods, precisely as it entitled him to do this in Iowa and Maine.

On the other hand, the cases cited from California and North Dakota, when read in the light of their Code provisions, range those States on the English side. In Polhemus *v.* Herman[1], the plaintiff contracted to sell and deliver certain quantities of wool, "to be as free of burrs as any in this section of the country." The wool, which he subsequently appropriated to the contract and delivered to defendants, was very burry. This breach of his engagement was set up by the defendants, in a suit for the price, as entitling them to damages. The trial judge charged that, as defendants did not offer to return the wool, upon discovering that it did not conform to the contract, the plaintiff was entitled to the whole of the price. He had judgment and the defendants appealed. The judgment was reversed on the ground that "having a warranty the defendants were not bound to return or offer to return the wool. If it was not what it was warranted to be, they might have done so, and thus have rescinded the contract; but they were at liberty to retain it and bring an action for the breach of the warranty, or plead the breach in reduction of damages, in any action brought by the vendors for the purchase money."

In Hoult *v.* Baldwin,[2] the agreement was for the sale and delivery thereafter of a harvester which "would do good work in cutting and threshing ordinary grain, stand-

[1] (1873) 45 Cal. 573. [2] (1885) 67 Cal. 610.

ing from one to five feet in height." The machine did not work as agreed, was not reasonably fit for the purpose for which it was ordered[1] and moreover had latent defects arising from the process of manufacture[2]. The court, therefore, declared that the written guaranty and the warranties provided in the code attended and were "conditions of the sale." Such would have been the conclusion in England upon the same state of facts.

Indeed, the provision of the California Code, defining the rights of the buyer in case of breach of warranty, is a concise statement of the English law as announced in Street *v.* Blay[3]. It reads as follows: Sec. 1786. "The breach of a warranty entitles the buyer to rescind an agreement for sale, but not an executed sale, unless the warranty was intended by the parties to operate as a condition."

The Codes of North Dakota[4] and of South Dakota[5] have reproduced this section. In the latter State, we have the judicial declaration that "this section states briefly, but clearly, the rule as it existed before the adoption of the code. Voorhees *v.* Earl (N. Y. 1842) 2 Hill 288; Cary *v.* Graman (N. Y. 1843) 4 Hill 625; Muller *v.* Eno (1856) 14 N. Y. 597; Thornton *v.* Wynn (1827) 12 Wheat. 183; Case *v.* Hall (1840) 24 Wend. 102.[6]

The rule in Louisiana does not seem to accord with either the Massachusetts or the English rule. It is stated as follows in Art. 2529 of the Code. "A declaration made

[1] The California Civil Code provides, "One who manufactures an article under an order for a particular purpose, warrants by the sale that it is reasonably fit for that purpose." § 1770.

[2] The Code also provides, "One who sells or agrees to sell an article of his own manufacture, thereby warrants it to be free from any latent defect, not disclosed to the buyer, arising from the process of manufacture, and also, that neither he nor his agent in such manufacture has knowingly used improper materials therein."

[3] (1831) 2 B. & Ad. 456.

[4] Sec. 3988. In Canham *v.* Plano Manufacturing Co. (1893) 3 N. D., 229, it does not appear whether the Court deemed the agreement one for the sale of the machine, or treated the engagement that "the binder would do as good work as any binder in the market" as "intended by the parties to operate as a condition." It was not necessary for the Court to discuss these questions, as the only defense insisted on by the seller (assuming that the agent had authority to give the warranty as to the character of the machine) was "that the plaintiff did not rescind the contract promptly after discovering the defect."

[5] Sec. 1340. [6] Hull *v.* Caldwell (1893) 3 S. D: 451, 453.

in good faith by the seller, that the thing sold has some quality which it is found not to have, gives rise to a redhibition, if this quality was the prime motive for making the purchase." In an action for rescission by the purchaser of a slave, who had been warranted a good cook, when she was not, the court held that as plaintiff had not alleged that this quality was the principal motive for the purchase, he could not obtain rescission.[1]

The cases cited from Nebraska[2] and Ohio[3] would have been decided in the same way in England. The so-called warranties in the agreements involved in those cases are declared by the English Sale of Goods Act, to be conditions, giving the buyer the right to treat the contract as repudiated and to reject the goods. In the later of the two Nebraska cases, the court is careful to make this statement: "As we view the evidence in this cause, we need not determine the general rule in regard to the liability for breach of a warranty. There was evidence introduced which, although somewhat indefinite and unsatisfactory, would possibly sustain a finding that the contract was to the effect that if the machine was not as represented, or warranted, it was to be returned; and if this was true, there could be a rescission. There was ample evidence to sustain the finding that the contract was executory; that the machine was warranted as to quality, to be fit and suitable for a stated specific purpose. * * Under

[1] Buhler *v.* McHatton (1854) 9 La. Ann., 192.

[2] Davis *v.* Hartlerode (1893) 37 Neb. 864. Plaintiff represented that the corn sheller would "run with 8 horses and shell 6,000 bushels of corn." Defendant's evidence was "I said if it would run that way, I would take it." It was returned immediately after trial demonstrated that it was not such a machine as described. McCormick Harvesting Co. *v.* Knoll (1899) 57 Neb. 790. Harvester and Self Binder failed to serve the special purpose for which it was ordered and was promptly returned.

[3] Byers *v.* Chapin (1876) 28 O. St. 300. The head note states that "a party selling articles for a specific purpose impliedly warrants that they are fit for that purpose, and a failure of such warranty is ground for rescission of a contract based upon it." But the implied warranty in this case was not on the part of the seller, but on the part of the buyer, and related to the quality of work done by the latter on certain chattels. A failure to make good that warranty, the court said, was a failure in an essential element. If the head note is thrown aside, it is difficult to find in the case any holding bearing on this topic. Certainly there is nothing to justify the citation of the case as one following the Massachusetts rule as to rescission for breach of warranty.

such facts and circumstances a rescission was proper for a breach of warranty."[1]

What has been said of the Nebraska and Ohio cases is equally applicable to those cited from Kansas.[2]

There remain for consideration the cases cited from Alabama, Missouri and Wisconsin. Undoubtedly, these contain numerous dicta that the breach of warranty entitles the buyer to rescind, but not one of the decisions is in conflict with the English law as laid down in Street *v.* Blay. The engagement (called a warranty by the Court) was either an unmistakable condition, as distinguished from a collateral or subsidiary promise,[3] or was actually fraudulent,[4] or the seller's engagement, as interpreted by the Court, was to supply an article reasonably fit for a particular purpose made known to him, so as to show that the buyer relied on the seller's skill or judgment.[5] In the re-

[1] Pp. 792, 793. The head note confines the decision to an executory contract for the sale of an article represented fit for a specified purpose.

[2] Craven *v.* Hornburg (1881) 26 Kan. 94. Unfitness for specified purpose. Weybrick *v.* Harris (1883) 31 Kan. 92. Right to return was expressly given by the contract. Manufacturing Co. *v.* Starky (1891) 45 Kan. 606. On p. 610 the court says: "It is not necessary in this case that we should hold that in all cases of a breach of warranty in the sale of personal property, the vendee may return or offer to return the property and rescind the contract; but we think such is the rule for cases like the present, where the property purchased and received is substantially different from what it was warranted to be, and will not answer the purpose for which it was warranted."

[3] Thompson *v.* Harvey (1888) 86 Ala. 519. This contract contained the special provision, that if the horse was not as represented, it should be rescinded, p. 521. Ransom *v.* Turner (1883) 77 Mo. 489. A sale by description in writing; the buyer without seeing the oxen replied "If your cattle are as good as represented, you can deliver them to me," &c. Croninger *v.* Paige (1880) 48 Wis. 229 "The plaintiffs assumed to sell an article which the purchaser might lawfully put to its intended use." His engagement, therefore, was a vital not a subsidiary promise. Warder *v.* Fisher (1879) 48 Wis. 338. If the machine did not work as warranted, it was to be returned to the sellers.

[4] Barnett *v.* Stanton (1841) 2 Ala. 181 [cited in Thompson *v.* Harvey supra as settling the rule that the buyer's right of rescission for breach of warranty is not restricted to cases of fraud. The statement in the Barnett case to that effect is a mere dictum, as the warranty was clearly fraudulent; the buyer had not offered to return the goods, but had sold half of them and set up seller's fraud as a defense in toto. It should be noted, however, that in Alabama, a false though innocent warranty, which is an inducement to the purchaser to buy, is accounted a fraud. Blackman *v.* Johnson (1859) 35 Ala. 252. Hopper *v.* Whitaker (1900) 130 Ala. 324.] Edwards *v.* Noel (1901) 88 Mo. App. 434.

[5] Pacific Guano Co. *v.* Mullen (1880) 66 Ala. 582. Hodge *v.* Tufts (1896) 115 Ala. 366. Kerr. *v.* Emerson (1895) 64 Mo. App. 159. St. Louis Brewing Assoc. *v.* McEnroe (1898) 80 Mo, App. 429. Boothby *v.* Scales (1871) 27 Wis. 626. Minn. Threshing Co. *v.* Wolfram (1897) 96 Wis. 481.

maining cases, the buyer did not attempt to return the goods,[1] or the evidence failed to show that he seasonably returned them.[2]

SUMMARY OF RESULT.

The result of this re-examination of the cited cases is this: In but two jurisdictions (Iowa and Maine) have the courts unequivocally adopted the Massachusetts rule. Even if we suppose that the habit of repeating as a dictum the terms of that rule has become so inveterate in Alabama,[3] Missouri and Wisconsin, as to justify the belief that the courts of those States will follow it, when the question is squarely presented, we have but five jurisdictions following the lead of Massachusetts. On the other hand, the learned writer of the article in question enumerates sixteen jurisdictions which have followed the English rule.[4] To these should be added, as we have seen, California and North Dakota, and also Hawaii.[5] When we bear in mind that the doctrine of the United States Supreme Court is controlling in every Federal tribunal of the nation, in the absence of local statutes, the preponderance of American authority against the Massachusetts rule is simply overwhelming.

LORD ELDON'S BLUNDER AND ITS CORRECTION.

It is often said that prior to the decision in Street *v.* Blay, the English law was supposed to allow rescission for the breach of a collateral warranty.[6] In support of this

[1] Parry Mn'fg. Co. *v.* Tobin (1900) 106 Wis. 286. Optenburg *v.* Skelton (1901) 109 Wis. 241.

[2] Johnson *v.* Whitman Ag'l. Co. (1885) 20 Mo. App. 100. The facts of this case do not show what the so-called warranty was, nor whether the transaction was a present sale or a contract to sell.

[3] In Rand *v.* Oxford (1859) 34 Ala. 474, and Athey *v.* Olive Id. 711 the court declined to say whether a right of rescission existed where there was a mere breach of warranty without fraud.

[4] United States Supreme Court, Connecticut, Georgia, Illinois, Indiana, Kentucky, Michigan, Minnesota, New York, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Vermont, Ontario. 16 H. L. R. 466 Note 1.

[5] Hegerty *v.* Snow (1854) 1 Hawaii 198. In Stelwagon *v.* Wilmington Coal Gas Co. (1896) 2 Marvel (Del.) 184 and Woodward *v.* Emmons (1897) 61 N. J. L. 281, are dicta indicating an approval of the English doctrine.

[6] In the argument for the buyer and in the opinion in Bryant *v.* Ishburgh (1859) 13 Gray (79 Mass.) 607 and in 16 H. L. R. 465 note 1.

assertion are cited Curtis *v.* Hannay, Selwyn's Nisi Prius, Long on Sales and Starkie's Evidence. The report of Lord Eldon's charge to the jury in Curtis *v.* Hannay[1] represents him as saying that "he took it to be clear law, that if a person purchases an horse which is warranted, and it afterwards turns out that the horse was unsound at the time of the warranty, the buyer might, if he pleased, keep the horse and bring an action on the warranty in which he would have a right to recover the difference between the value of a sound horse and one with such defects as existed at the time of the warranty; or he might return the horse and bring action to recover the full money paid." He had previously stated to the jury that "he thought the matter set up by the defendant was no defence to the action," which was for the purchase price, and concluded his charge "with saying that if the jury thought that if any future purchaser was to be told that the horse had been blistered and doctored, would diminish his value in the estimation of such purchaser, they should find a verdict for the plaintiff; which they accordingly did for forty-five guineas, the price agreed upon." This report is the only authority cited by Selwyn[2] or Long or Starkie in support of the buyer's right of rescission; and it is worth noting that Long, in his chapter on rescinding contracts, declares that one party to a sale "cannot, without the assent of the other, rescind an absolute contract of sale."[3]

In Street *v.* Blay,[4] the correctness of Lord Eldon's reported statement of the buyer's right of rescission was challenged, and the Court of King's Bench, consisting of Lord Tenterden and JJ. Littledale, Parke and Patteson, unhesitatingly declared that it was irreconcilable with a line of carefully considered cases,[5] extending back to 1778. "If these cases are rightly decided," said the court, "and we think they are, and they certainly have been always acted upon, it is clear that the purchaser cannot, by his

[1] (1800) 3 Espinasse 82.

[2] The topic is discussed by this author under the head of Deceit.

[3] Long on Sales, Chap. VI. [4] (1831) 2 B. & Ad. 456; (22 E. C. L.)

[5] Weston *v.* Downes (1778) 2 Doug. 23; Power *v.* Wells, 2 Doug 24 note; (1778) 2 Cowp. 818; Towers *v.* Barrett (1786) 1 T. R. 133; Payne *v.* Whale (1806) 7 East. 274; Emanuel *v.* Dane (1812) 3 Camp. 299.

own act alone, unless in the excepted cases above mentioned, revest the property in the seller."

The same conclusion had been reached four years earlier by the Supreme Court of the United States.[1] After a careful examination of the English decisions, Washington J., writing for a unanimous court, approves and follows the ruling of Heath J. in Lewis *v.* Congreve,[2] that the purchaser of a horse with an innocent warranty can not rescind the sale and revest title in the seller without the latter's assent. In the language of the opinion, "If the sale be absolute, and there be no subsequent agreement or consent of the vendor to take back the article, the contract remains open, and the vendee is put to his action upon the warranty,[3] unless it be proved that the vendor knew of the unsoundness of the article, and the vendee tendered a return of it within a reasonable time."

Assuming, then, that Lord Eldon's charge to the jury in Curtis *v.* Hannay was correctly reported on the point in question, we have the not infrequent case of a blunder by an able judge in stating a rule of law at Nisi Prius, without an opportunity to examine prior decisions. This blunder was repeated by text-writers, who digested reported cases, without subjecting them to critical examination; but it was exposed and repudiated as soon as it was brought to the attention of a court in banc. To assert, that "before the decision of Street *v.* Blay, the English law was supposed to allow rescission" for breach of warranty, is to make a most inaccurate statement. Four years before that decision, the Supreme Court of the United States had declared there was no ground for such an assertion. To be entirely accurate, the statement should be that Lord Eldon is reported to have said on one occasion, at Nisi Prius, that he entertained such a supposition; but that such supposition was irreconcilable with carefully considered decisions of Lord Mansfield, Justice Ashhurst, Justice Buller and others; that it had never resulted in a judgment for the buyer in any reported English case; that it was unanimously pronounced unwarranted by the United

[1] Thornton *v.* Wynn (1827) 12 Wheat, 183. [2] (1809) 2 Taunton 2.

[3] It is now conceded that the buyer can give in evidence the breach of warranty in reduction of the seller's claim for the price.

States Supreme Court in 1827, and by the Court of King's Bench in 1831, and that the views of these eminent tribunals have been approved by an overwhelming majority of American courts.

This "disputed question in American law" was recently presented for the first time to the Supreme Court of Michigan. That tribunal was free to choose between the Massachusetts rule and the English law. After tracing the history of the controversy, it reached the conclusion that "the few states which are said to follow the Massachusetts rule, and permit rescission for a mere breach of warranty, are out of line"; that, with the exception of Lord Eldon's supposition in Curtis *v.* Hannay, the English cases since 1778 had denied the right of rescission for the breach of a collateral warranty, that "Street *v.* Blay states the logical rule," and the rule to be followed in Michigan.[1] The same conclusion was reached, after a careful comparison of the merits and claims of the two rules, in Texas [2] and in Connecticut.[3]

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[1] H. M. Williams Transportation Line *v.* Darius Cole Trans. Co. (1901) 129 Mich. 209.

[2] Wright *v.* Davenport (1875) 44 Tex. 164. After referring to the Massachusetts doctrine, the court said: "The contrary rule is supported by much the greatest weight of authority; and as we think it rests upon the soundest principle, in the absence of any authoritative decision upon the question, in our own court, we are constrained to give it our sanction."

[3] Scranton *v.* Mechanics' Trading Co. (1870) 37 Conn. 130.